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78-1889

No.

Supreme Court, U. S.

FILED

JUN 21 1979

MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE BUTLER, RON JACKSON, CHARLES
JAMES, MONROE JENKINS, ERNEST LEWIS,
JAMES NASH and ESTATE OF NATHAN NASH,
DECEASED,

Petitioners,

vs.

GOLDBLATT BROS., INC., THOMAS MARSH, ANDRE
WALKER and DENNIS McFARLAND,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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June 21, 1979

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Petitioners Lawrence Butler, Ron Jackson, Charles James, Monroe Jenkins, Ernest Lewis, James Nash, and Estate of Nathan Nash, Deceased, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 29, 1978.

ORDERS AND OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered on December 29, 1978 (Appendix A, at 1a-8a, *infra*.) The

opinion has been reported at 589 F.2d 323. The opinion of the Court of Appeals denying petitioners' petition for rehearing *en banc* was entered on March 26, 1979, and corrected on April 19, 1979; that opinion, rendered by the original three judge panel, has not been reported, but is included herein (Appendix B, at 9a-10a, *infra*). Prior to trial, the District Court filed an opinion respecting petitioners' motions for summary judgment; that opinion has been reported at 432 F.Supp. 1122. Following the trial, the District Court filed an opinion denying respondents' motion for a new trial; that opinion has not been reported, but is included herein (Appendix C, at 11a-13a, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1978. Thereafter, petitioners filed a timely petition for rehearing *en banc* which was denied by a split vote on March 26, 1979; this Petition for Certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

When, after hearing the evidence, the jury concluded that Goldblatts was liable for the illegal arrest of petitioners, and the trial judge thereafter held "*the verdict reached by the jury was amply justified by the evidence*" and stated that he was himself "in substantial agreement with the verdict reached by the jury," did the Court of Appeals deprive petitioners of their right to a trial by jury and exceed the proper scope of appellate review when it disregarded both the evidence supporting the jury's

verdicts and the trial judge's concurring assessment of that evidence and reversed on the ground that the "evidence is not sufficient . . . to support a verdict of liability."

STATUTORY PROVISION INVOLVED

This case involves, in part, civil rights protected by 42 U.S.C. §1983. This statutory provision is included herein (Appendix D, at 14a, *infra*).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, the Fourteenth Amendment to the Constitution of the United States, and the doctrine of pendent jurisdiction.

Nature of the Action

The petitioners, Lawrence Butler, Ron Jackson, Charles James, Monroe Jenkins, Ernest Lewis, James Nash and Estate of Nathan Nash, Deceased, brought an action for damages to redress violations of their federal civil rights under 42 U.S.C. §1983 and the Fourteenth Amendment, arising from their false arrest and imprisonment without warrants and without probable cause. Under the doctrine of pendent jurisdiction, petitioners also claimed damages for violation of their rights under the law of the State of Illinois (common law false arrest and imprisonment).

The Parties

There have been, throughout this litigation, two separate sets of defendants. One set is composed of police officers employed by the City of Chicago; they are officers John McDonald, John Juriss, Frank Krause and John Kowalski. The other group is composed of Goldblatt Bros., Inc., a

department store chain headquartered in Chicago, and its private security police employees, Thomas Marsh, Andre Walker and Dennis McFarland (often collectively referred to herein as "Goldblatts"). All of the petitioners except Ernest Lewis are truck drivers employed by Goldblatts.

Proceedings in the District Court

This case was tried before a jury for nearly two weeks on Count I (42 U.S.C. §1983) and III (false arrest and imprisonment under Illinois law) of petitioners third amended complaint. Approximately 20 witnesses testified. The District Judge, Bernard M. Decker, directed verdicts in favor of six of the petitioners and against police officers McDonald and Juriss, specifically finding that the warrantless arrests were unconstitutional and made without a reasonable, good faith belief in the existence of probable cause. Judge Decker entered judgments *n.o.v.* in favor of petitioners Butler and Jenkins and against officers Kowalski and Krause, respectively, under *both* counts.

No directed verdicts or judgments *n.o.v.* were entered with respect to petitioner Lewis or against any member of the Goldblatts group. *All issues with respect to the involvement of Goldblatts in the illegal arrests went to the jury, as did all issues respecting the arrest of petitioner Lewis* (the only plaintiff who was not a Goldblatts' employee). This was in conformity with Judge Decker's pre-trial observation that "there exists a *question of fact* regarding the exact connection between the conduct of the police and the activities of [Goldblatts]." *Butler, et al v. Goldblatt Bros., Inc., et al*, 432 F. Supp. 1122 (1977) at 1129 (emphasis added).

The jury resolved the factual issues in favor of petitioners and against Goldblatts. It returned verdicts in favor of Lewis and against Goldblatt Bros., Inc. and Goldblatts' security agent Walker under 42 U.S.C. §1983, and in favor of the other six petitioners and against all the Goldblatts group for false arrest and imprisonment under Illinois law. The jury awarded Lewis \$6,630 in damages, and \$5,000 in damages to each of the other six petitioners. The jury was apparently so convinced by the evidence that Goldblatts was most responsible for the arrests that it took the extraordinary action of returning a note with its verdict stating that, in the jury's opinion, Goldblatts should pay over 80% of the damages awarded.

Judge Decker, a very experienced and respected trial judge, denied all motions for new trial and held by written opinion that "[t]he verdict reached by the jury was amply justified by the evidence," and he further stated that he was himself "in substantial agreement with the verdict reached by the jury in this case." (Appendix C, at 11a, 13a, *infra*.)

The Appeal to the Seventh Circuit

Both sets of defendants appealed to the United States Court of Appeals for the Seventh Circuit. A three judge panel of the Court of Appeals held that there was no basis for any reasonable, good faith belief that the warrantless arrests of the six petitioners employed by Goldblatts (all except Lewis) were based on probable cause and, therefore, *affirmed* the directed verdicts and judgments *n.o.v.* against the police officers. This petition is *not* directed to the court's affirmance of the judgments against the police.

The same panel's treatment of Goldblatts was, however, quite different. Although there was detailed testimony establishing that Goldblatts had caused and was intimately involved in every aspect of petitioners' arrest, and although the trial judge most familiar with the evidence considered it ample, the panel reversed *all* of the verdicts returned by the jury on the sole ground that it deemed the evidence insufficient to support the verdicts against Goldblatts. In so doing, the court adopted the losing party's version of the facts:

The record discloses, however, that Goldblatt's did not in any way detain the employees, nor did it sign a complaint against them or direct the officers to arrest them. Rather, the evidence suggests that Goldblatt's did nothing more than give information to the police, who were then free to decide for themselves whether or not the employees should be arrested. It is our view that this evidence is not sufficient under Illinois law to support a verdict of liability against Goldblatt's, and, for this reason, we must set aside the judgment of the jury on the state law claim of false arrest and imprisonment.

The same considerations also compel the conclusion that Goldblatt's "participation" in the arrest of Lewis is not actionable under 42 U.S.C. §1983. (Appendix A, at 6a-7a, *infra*.)

The opinion of the court is a textbook example of the mistakes which are certain to occur when courts of appeal usurp the function of the jury in resolving disputed issues of fact. It adopted a hotly disputed version of events urged by Goldblatts (the losing party), ignored important testimony heard by the jury, asserted there was no evidence of facts which were incontestably of record, and reiled upon a few reported decisions wholly

distinguishable from this case.* For example, the panel was simply wrong in stating that Goldblatts did not sign a complaint. The police testified that, prior to the arrest of Lewis or any of the other petitioners, Goldblatts agent Walker was asked "if he would sign a complaint and he indicated that he would," and it was *stipulated* that Walker did, indeed, sign a formal criminal complaint against Lewis. (Juriss, Tr. 402; Stipulated Facts, ¶I-16) The court's mistake was a matter of importance because the commanding police officer testified that Walker's accusation and signing of the complaint was one of the major factors which induced the police to proceed with the other arrests. (McDonald, Tr. 330, 769) Petitioners attempted to bring these facts, as well as the other testimony supporting the jury's verdicts, to the court's attention in their petition for rehearing *en banc*. (Appendix E, at 15a-29a, *infra*.)

Rehearing Denied on Split Vote

Chief Judge Fairchild and Circuit Judge Swygert voted to grant petitioners' suggestion for rehearing

* *Morris v. Faulkner*, 46 Ill. App. 3d 625 (1977) and *Middleton v. Kroger*, 38 Ill. App. 3d 295 (1976), cited by Goldblatts and relied on by the court were totally inapposite. In *Morris*, there was *not even an arrest*, much less an unconstitutional arrest; the only prior contacts with the police were two telephone calls by a barmaid; and, the *only* police action was a request that plaintiffs leave the bar. In *Middleton*, the only pre-arrest contact with the police was *one* telephone call, the private party was not at the scene of and did not play any role whatever in the arrest, the arresting police officer personally observed tangible evidence of the crime prior to the arrest, and the plaintiff was *not* "jailed or incarcerated at any time in connection with this episode." *Middleton v. Kroger*, *supra*, at 38 Ill. App.3d 297.

en banc. However, the majority voted to deny the rehearing, and the panel of the court which originally decided the case issued a second opinion in which it struggled to correct the errors of the first. After having incorrectly made much of the fact that no complaint was signed, the panel reversed itself and dismissed the signing of the complaint as inconsequential, paying no attention to the fact that that action was but one of many undertaken by Goldblatts in connection with the arrests:

The plaintiffs-appellees' petition for rehearing notes that the panel's opinion appears to ignore the fact that Walker (a Goldblatts employee) signed a complaint against Lewis after allegedly receiving a threat from him. In our view, however, this fact is not enough to establish that Goldblatt's acted in concert with state officials and is therefore liable under §1983. Moreover, *we are not persuaded* that the arrest of Lewis was made without probable cause. (Appendix B, at 10a, *infra* [emphasis added].)

The panel's second opinion was significantly defective in at least two respects. First, it continued the panel's original approach of attempting to review the evidence *de novo*, maintaining that it, rather than the jury, must be "persuaded" of the facts at issue and substituting its own contrary inferences and conclusions for those of the jury. Second, the panel continued to discount or ignore the mountain of testimony tending to support the jury's determination that Goldblatts unlawfully caused and participated in the arrest of petitioners. The panel simply refused to acquiesce in the jury's resolution of the disputed issues of fact.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRONEOUSLY DEPRIVED PETITIONERS OF THEIR RIGHT TO A TRIAL BY JURY AND EXCEEDED THE PROPER SCOPE OF APPELLATE REVIEW WHEN IT DISREGARDED BOTH THE EVIDENCE SUPPORTING THE JURY'S VERDICTS AND THE TRIAL JUDGE'S CONCURRING ASSESSMENT OF THAT EVIDENCE AND REVERSED THE JURY'S VERDICTS ON THE GROUND THAT THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT A VERDICT OF LIABILITY.

Thirty-five years ago, in 1944, this Court was compelled to remind the Seventh Circuit that "[i]t is the jury, not the court, which is the fact-finding body." *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944) at 35. The decision of the Court of Appeals in this case shows that this simple principle is in desperate need of resuscitation. This Supreme Court must, once again, make clear that appellate courts are not forums for reconsidering disputed issues of fact already resolved by trial court juries. It must reaffirm the fundamental right of citizens to trial by jury. The principle is an important one, especially in this period of ever increasing judicial activity. Because this case presents the issue so directly, it is the perfect vehicle for a much needed modern restatement of the principle.

Restrictions on Appellate Review of Jury Verdicts

Prior to its decision in this case, the Seventh Circuit had long followed the elementary rule that a jury's verdict cannot be set aside unless there is no credible evidence from which the jury's conclusion may be inferred. It had recognized that an appellate court is not justified in rejecting a jury's verdict because it might have reached

a different conclusion, and that the court must accept as true that version of the testimony which the jury might have adopted in reaching its verdict, indulging every reasonable intendment in favor of the verdict. *Continental Airlines v. Wagner-Morehouse, Inc.*, 401 F.2d 223 (7th Cir. 1968); *Galard v. Johnson*, 504 F.2d 1198 (7th Cir. 1974); *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952).

Whenever necessary, this Court has itself articulated the same rule:

Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where . . . there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. *Lavender v. Kurn*, 327 U.S. 645 (1946) at 653.

See, accord, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959). As Mr. Justice Murphy stated in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1943),

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions,

and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [Citations omitted.] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.* Id., at 321 U.S. 35 (emphasis added).

The Seventh Circuit's reappraisal of evidence and rejection of the jury's verdicts in this case places it in direct conflict with the foregoing decisions of this Court as well as its own earlier opinions.

No Dispute As To Underlying Rules Of Liability

It must be observed that this petition does *not* raise any issue with respect to the underlying rules of liability applicable in this case. It is undisputed that merely providing information justifying an arrest to the police does not give rise to liability under Illinois law. It is certain, however, that actions of private parties, such as Goldblatts, which "induce," "instigate," "procure," "prompt," or otherwise "aid," "abet," or "cause" an unconstitutional arrest *do* give rise to such liability under Illinois law. *Dodds v. Board*, 43 Ill. 95 (1867); *Reno v. Wilson*, 49 Ill. 95 (1868); *Zimbron v. 1400 Lake Shore*, 8 Ill. App. 2d 542 (1956); *Odorizzi v. Smith*, 452 F.2d 229 (7th Cir. 1971), *Luker v. Nelson*, 341 F. Supp. 111 (N.D. Ill. 1972). It is equally certain that a private party who "participates" in an unlawful arrest, either directly or indirectly, is liable therefor, and that "*what constitutes participation depends on*

the facts and circumstances of each case." 35 C.J.S. False Imprisonment §28 (emphasis added), *Luker v. Nelson*, *supra*. The requirements of 42 U.S.C. §1983 are quite similar: "It is enough that [the private party] is a willful participant in joint activity with [the police]" giving rise to the unconstitutional arrest. *U.S. v. Price*, 383 U.S. 787 (1966) at 794 (emphasis added). Finally, there is no dispute that Judge Decker properly instructed the jury as to the foregoing rules of liability.

The Applicable Standard

The standard by which the Court of Appeals' reversal of the jury verdicts in this case must be measured is, then, a narrow one: Was there a complete absence of evidence from which the jury was entitled to infer that Goldblatts instigated and caused the arrest of petitioners and, with respect to petitioner Lewis, participated in joint activities with the police which gave rise to his arrest without probable cause?

The Testimony Heard by the Jury

The testimony demonstrates that Judge Decker was correct when he held that "the verdict reached by the jury was amply justified by the evidence." We here discuss some of the highlights of the testimony heard by the jury; a more detailed summary of the evidence, together with the inferences which the jury was entitled to draw, is set forth in petitioners' petition for rehearing *en banc* in the Court of Appeals which is included herein as Appendix E. (See, Appendix E, at 20a-29a, *infra*) As Appendix E and the following discussion make clear, the evidence presented provided a credible basis for the jury's determination that the unconstitutional arrest of petitioners was a Goldblatts operation from start to finish. It shows that there was evidence from which the jury was

entitled to conclude that Goldblatts did induce and cause the arrests and that Goldblatts was an active, direct participant in every phase of the arrest and imprisonment process.

As is evident from its opinion, the Court of Appeals adopted Goldblatts' version that the series of events involved in this case began when one of its paid undercover informers (Wayne Young) "reported" that petitioners were plotting to murder agent Walker. However, the jury did not adopt Goldblatts' version. It was entitled to and did conclude that Goldblatts' version was a tissue of lies. It heard extensive testimony from which it was entitled to infer that the paid informer's "report" was dreamed up after-the-fact and that the arrests actually sprang from a climate of intense hostility long existing between Goldblatts' private security agents at the warehouse and Goldblatts' truck drivers working out of the same warehouse—including petitioners and, especially Monroe Jenkins. Jenkins, who had originally been hired by Walker as a truck driver and undercover agent, testified to a series of "run-ins" with security beginning when he resigned from security and joined the union. (Jenkins, Tr. 211-213) Goldblatts' security had had Jenkins fired twice, only to be thwarted by the union which got his job back. (Jenkins, Tr. 213)

Significantly, the jury heard testimony that this was not the first time that Goldblatts had used the police against its own truck drivers. Agent Walker had previously used the police against Jenkins by having him arrested for "verbal assault;" the charges were dropped when Jenkins counter-charged Walker. (Jenkins, Tr. 217-218) The testimony showed that the level of hostility had reached the point that Goldblatts' security agents were

"writing up" petitioners for eating ice cream cones "on company time." (See, e.g., Walker, Tr. 805-806) The testimony of agent Walker made that hostility palpable to the jury:

Q: Isn't it a fact, Mr. Walker, that you blame Monroe Jenkins for the hostility existing between the Goldblatts' Security department and the Goldblatts' truck drivers?

A: I don't put all the blame on him but he had had a lot to do with it, yes.

. . .

Well, he creates a problem all the time. Whenever we attempt to unload somebody's truck he seems to think that he is the dock lawyer, or something. That's what the guys call him. And he is always in the middle of it, you know; "You don't have to do this because Security tells you to," and "You don't have to do that. You don't have to handle your papers. You don't have to do everything that Security tells you to."

. . .

Q: Isn't he known as one, I mean, as a person who stands up for his rights, for the rights of himself and his friends?

A: No, he is known for making trouble any time he gets the chance. He likes to create chaos. (Walker, Tr. 843)

The Court of Appeals also adopted Goldblatts' contention that it had done nothing more than innocently provide information to the police. That contention, however, embodied hotly disputed issues of fact which only the jury was competent to resolve. The jury resolved those issues *against* Goldblatts. That resolution was supported by testimony that Goldblatts had, among other things, repeatedly and intentionally deceived the police in order induce to the arrests.

The police testified that Goldblatts had contacted them on September 19, approximately a week before the arrests, and falsely told them that Goldblatts had received an anonymous telephone tip of a plot to murder Walker. (Krause, Tr. 745-746) When the police refused to act, Goldblatts went back with a *new* story, claiming that the "information" had originated with an informer whom they refused to identify. (Krause, Tr. 744-746) Goldblatts told the police that their unnamed informer had stated that the killing was to be "in retaliation" for agent Walker's testimony in a then pending theft case. On cross-examination of Wayne Young, the supposed informer, the jury learned that he had previously testified *under oath* that he never knew any reason why Walker was to be killed: "*I don't know what it was. It could have possibly been for anything.*" (Young, Tr. 889) The jury also learned that the informer was himself a criminal defendant in the very case in which Walker was to testify for the prosecution and that, thanks to Walker's testimony, the charges against him were dropped. (Juriss, Tr. 384-385) This testimony tended to support the jury's conclusion that the purported "motive" behind the conspiracy was nothing more than a Goldblatts' ploy designed to induce police action and that the informer's subsequent cooperation was the price he paid for Walker's saving him from being bound over to the grand jury for indictment. This inference was further supported by Young's pre-trial admission, recounted to the jury, that "he didn't want to be the informant in this case but he was doing Andre Walker a favor." (Jackson, Tr. 696)

The Court of Appeals' extraordinary finding that Goldblatts was merely providing information to the police was further contradicted by testimony from which the jury

was entitled to infer that the Goldblatts security agents had no interest whatever in cooperating with or providing information to the police, but, rather, were only interested in obtaining the arrests without exposure of the trumped-up nature of their accusations. For example, the police testified that Marsh and Walker refused to disclose their informer because of a claimed concern for his safety. (McDonald, Tr. 315; Krause, Tr. 728) However, Marsh and Walker later admitted that there was no objective basis for any belief that the informer would be endangered by disclosure to the police and that the informer's identity was concealed so as not to "blow his cover" and because "it would make him ineffective as an undercover investigator for Goldblatts." (Marsh, Tr. 510; Walker, Tr. 788, 824) The testimony also demonstrated that Goldblatts controlled and prevented any pre-arrest investigation. The police testified that they had an *obligation to investigate* the charges when made by Goldblatts, but that it was "impossible" to do so without the information withheld by Goldblatts. (Juriss, Tr. 414-415, 429) On the same subject, Walker testified as follows:

Q: So, in effect, Andre Walker and Thomas Marsh were making decisions about the way it was to be done, is that correct?

A: In which way? The way the investigation was being handled, do you mean?

Q: That is right.

A: At the time, yes, because we [Goldblatts] were the only ones who could investigate it. (Walker, Tr. 825-826)

Marsh and Walker met again with the police on September 24, the day before the arrests. By this time the Goldblatts agents perceived themselves as full partners with the police; Marsh testified that they discussed with

the police "how *we* were going to do it, whether *we* were going to be in plainclothes, and what kind of car and Walkie-Talkie, and things like that." (Marsh, Tr. 545) Goldblatts would not, however, permit the heat of the hunt to be cooled by levelling with the police. Marsh himself admitted that at this meeting the police again demanded the identity of the informer and requested that he be made available to the State's Attorney's office, and that Goldblatts rejected the request. (Marsh, Tr. 546) The jury was entitled to conclude that Goldblatts was *not* innocently providing information to the police, but was, instead, manipulating them for use against the petitioners.

As suggested by the foregoing, the jury had good reason to conclude that the cloak of good citizenship and honesty in which the Goldblatts agents attempted to wrap themselves was as transparently incredible as the emperor's new clothes. For further example, the jury was entitled to conclude that Walker told a bald lie to the police when he accused Lewis of attacking him in the courtroom. Lewis categorically denied any such attack. The police officer who had Walker under surveillance at the time testified that he had been "*concentrating*" on Walker and did not see any incident of any kind involving Lewis and Walker. (Juriss, Tr. 389-390) On this issue even Walker's own informer deserted him. Wayne Young was on the scene "a few paces behind" Walker (Walker, Tr. 834), and he, too, denied observing any such incident. In addition, virtually every statement which Wayne Young, the alleged informer, made as to when he supposedly learned of the plot was impeached by *his own prior testimony under oath*. (Young, Tr. 870-908) Moreover, Young's credibility with the jury was totally shattered when petitioners introduced Lewis' employer's time cards which

showed that Lewis was at work on the North Side of Chicago at the very moment Young had placed him in a South Side bar hatching the murder plot. (Lewis, Tr. 933-940) Clearly, then, there was a good and sufficient basis for the jury to reject as untrue the entire Goldblatts' version of events which was, however, adopted wholesale by the Court of Appeals.

The jury also heard testimony that Goldblatts planned and actively participated in the entire arrest operation. The meetings of September 19 and 24 have already been mentioned. Still *before* the day of the arrests, Marsh and Walker privately devised a scenario to make police action against the petitioners a reality. Their plan called for Walker to be "attacked" by one of the petitioners, which attack would, Goldblatts thought, finally provoke police action. (Marsh, Tr. 547-548) The testimony supported the jury's conclusion that there never was any such attack but that, in precise conformity with Marsh and Walker's scenario, Walker falsely accused petitioner Lewis of assaulting him. Thereafter, Lewis was arrested and there was still another meeting at Area 3 police headquarters, at which time the order was issued to arrest the other petitioners. (McDonald, Tr. 332)

The jury's determination that Goldblatts was liable for the arrests was further buttressed by testimony showing Goldblatts' intensive participation in the actual arrest and imprisonment process. Although the police had neither probable cause nor warrants authorizing them to arrest petitioners at Goldblatts' warehouse, Goldblatts permitted the police to enter and remain on the warehouse premises for over five hours arresting petitioners. (Stipulated Facts, ¶I-6) The Goldblatts agents were active and vocal participants in all the arrests, fingering the petitioner

truck drivers as they drove in and laughing as they were taken into custody: "And Andre Walker pointed his finger out and say, 'Yeh, that's one of them,' and he was standing over there laughing." (Jackson, Tr. 683; also see, Butler, Tr. 275-276; Jenkins, Tr. 201, 207; James, Tr. 590) When disputes arose between the shocked petitioners and the police, Goldblatts personnel, rather than leaving what was incontestably police business to the police, intervened directly in the arrest process. (Jenkins, Tr. 207) When one of the petitioners was late in returning to the warehouse, Goldblatts personnel went with the police in a police car to track him down. (Stipulated Facts, ¶I-8) Once he was located, pointed out by the Goldblatts agent, arrested, and placed in the squad car, the Goldblatts security agent attempted to interrogate him *in the squad car*. (J. Nash, Tr. 623) Even in the Area 3 stationhouse after the arrests, and while petitioners were in police custody, Goldblatts personnel berated, threatened, and attempted to interrogate them. (Jackson, Tr. 687-688) Their role was so much like that of police officers that petitioner Lewis, who was not employed by Goldblatts, believed that the Goldblatts agents who threatened him were Chicago police officers:

Q: . . . Was there anyone else besides Andre Walker that you saw [at Area 3] who works for Goldblatts. . . .

A: Well, Tom Marsh and Dennis McFarland, or whatever his name was, *I thought that they were police officers.*

. . .

Q: And what did you see Tom Marsh do?

A: Well, he came into the room [at Area 3] after the other officer left out of there and he told me — First I said, "I'm no criminal," and, well, he said, "If anything happens to Andre Walker" — that something

bad is going to happen to me. So I kept saying, "I am no criminal. I don't even know this man."

Q: And what did he say?

A: He just — he just told me that if anything bad happened to him something bad was going to happen to me. (Lewis, Tr. 89-91)

The jury's finding of fact that, with respect to Lewis, Goldblatts acted "under color of law" was clearly well founded. By the same token, there was clearly a sufficient evidentiary basis for the jury to conclude that, in the light of all of the testimony, Goldblatts went miles beyond merely providing information to the police and, in fact, both caused and participated in the arrests.

Additional evidence concerning the arrest of Lewis is also set forth in Appendix E. In its original opinion, the Court of Appeals grounded its determination that Goldblatts has not violated 42 U.S.C. §1983 with respect to Lewis on its amazing finding that Goldblatts had *not* signed a complaint against him. When petitioners, in seeking rehearing *en banc*, pointed out that the record demonstrated that Goldblatts had promised to sign a complaint before his arrest and, indeed, did so afterwards, the panel of the court responded:

In our view, however, this fact is not enough to establish that Goldblatts acted in concert with state officials and is therefore liable under §1983. Moreover, we are not persuaded that the arrest of Lewis was made without probable cause. (Appendix B, at 10a, *infra*.)

The panel was dead wrong on both counts. Petitioners had *never* maintained that the single fact of signing a complaint, with nothing more, was sufficient to give rise to liability under 42 U.S.C. §1983. Petitioners did main-

tain, and the testimony shows, that the arrest of Lewis was the result of *all* of the joint activities with the police described above and in Appendix E. The jury was instructed that the police officer's "good faith" defense was available to the police even if the arrest of Lewis was *without* probable cause. Indulging every reasonable intendment in favor of the jury's verdict, as required by law, inescapably leads to the conclusion that the jury determined that Lewis was arrested without probable cause, even though the police officers successfully interposed the good faith defense as to him. That the Court of Appeals was "not persuaded" of the fact that the arrest was without probable cause was totally beside the point. The entity to be persuaded of the fact that Lewis's arrest was made without probable cause was the *jury*.^{*} The jury was clearly well persuaded; it found that Goldblatts had violated 42 U.S.C. §1983 as to him and awarded him damages more than 20% higher than the damages awarded the other petitioners.

Petitioners also submit that the decision of the Court of Appeals with respect to Lewis is in direct conflict with this Court's decision in *Adickes v. Kress*, 398 U.S. 144 (1970). In *Adickes*, this Court held that the "mere presence" of a police officer in the private defendant's restaurant could be a sufficient basis for a jury to infer an understanding between the private defendant and the police which, in turn, would satisfy the state action

^{*} Judge Decker had earlier held:

"Whether the entirety of these circumstances provided the police with probable cause to arrest Lewis is therefore a *factual question to be resolved by a jury*." *Butler, et al. v. Goldblatt Bros., Inc., et al.*, 432 F.Supp. (1977) at 1125 (emphasis added).

requirement. This Court further stated that the state official's actions did not have to be unlawful in order to find that the private defendant's actions were in violation of the law. Therefore, the fact that the police officers who participated in Lewis's arrest successfully raised the good faith defense as to him did not immunize Walker and Goldblatt Bros., Inc. from liability. Further, as indicated above and in Appendix E, the evidentiary basis supporting the jury's verdict in favor of Lewis was immeasurably stronger than that which this Court found sufficient in *Adickes*. The decision of the Court of Appeals with respect to Lewis cannot be reconciled with *Adickes* and is clearly erroneous.

Clearly, as held by Judge Decker, there was ample evidence to support the verdicts returned by the jury. The Court of Appeals' election to reweigh and reinterpret that evidence in favor of Goldblatts, the losing party, is inexplicable and erroneous. More importantly, the action of the Court of Appeals is in direct contradiction to the uniform rule that *disputed issues of fact are to be resolved by the trier of fact at the trial court level*. If the record in this case is deemed so lacking as to open the door to appellate reevaluation of the evidence and rejection of the jury's verdicts, it is difficult to imagine any case, no matter what the evidence, in which a court of appeals would not be free to do the same. Such an approach ignores the necessity of judicial economy, is in direct conflict with the principles of appellate review previously articulated by the Seventh Circuit and this Court, and effectively deprives petitioners, and others like them, of their certain right under the Constitution: The right to a trial by jury.

CONCLUSION

For the reasons above stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

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June 21, 1979

APPENDIX A

Opinion of the United States Court of Appeals
for the Seventh Circuit entered December 29, 1978
Nos. 77-2043, 77-2044, 77-2074 and 77-2149
LAWRENCE BUTLER, CECIL DAVIS, RON JACKSON, CHARLES
JAMES, MONROE JENKINS, ERNEST LEWIS, JAMES NASH,
and ESTATE OF NATHAN NASH, Deceased,
Plaintiffs-Appellees,
v.
GOLDBLATT BROS., INC., THOMAS MARSH, DENNIS MCFAR-
LAND, ANDRE WALKER, WAYNE YOUNG, and ELMER GERL,
JOHN KOWALSKI, JOHN JURISS, FRANK KRAUSE, and
JOHN McDONALD,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 74 C 3000—BERNARD M. DECKER, *Judge.*

ARGUED MAY 30, 1978—DECIDED DECEMBER 29, 1978

Before PELL, BAUER, *Circuit Judges*, and HARPER, *Se-
nior District Judge.**

BAUER, *Circuit Judge.* This appeal involves a civil
rights claim under 42 U.S.C. § 1983 and a pendent state
law claim for false arrest and imprisonment. The action
was brought by two groups of plaintiffs: (1) six em-
ployees of Goldblatt Brothers, Inc., namely, Lawrence
Butler, Cecil Davis, Ron Jackson, Charles James, Mon-

* The Hon. Roy W. Harper, United States District
Court for the Eastern and Western Districts of Missouri,
is sitting by designation.

roe Jenkins, James Nash and Nathan Nash¹ [hereinafter six Goldblatt employees]; and (2) Ernest Lewis, a friend of the six employees. The named defendants in the action also consisted of two groups: (1) four Chicago policemen, namely, John McDonald, John Juriss, John Kowalski and Frank Krause [hereinafter police appellants]; and (2) Goldblatt Brothers, Inc., together with four members of its security department, namely, Wayne Young, Thomas Marsh, Andre Walker and Dennis McFarland [hereinafter Goldblatt's].

The major issues on appeal arise from a series of events that began when Wayne Young, an "undercover" agent for the Goldblatt security department, reported that the plaintiff-appellees were plotting to murder a Goldblatt security officer named Andre Walker. As described by Young, the plot called for Walker to be killed on the day he was scheduled to testify against Jessie Green, a former Goldblatt employee who had been fired for allegedly stealing goods that belonged to the store.

Upon receiving Young's report, Walker and the director of Goldblatt security, Thomas Marsh, contacted the police appellants and informed them of Young's allegations. Although Marsh and Walker did not disclose either Young's identity or the names of the alleged conspirators, the law enforcement officers arranged for Walker to receive police protection on the day of his scheduled court appearance.

¹ Nathan Nash died shortly after the law suit was filed, and his estate was substituted in the proceedings. The defendant-appellants now argue that Nash's claim for false arrest and imprisonment abated with his death. However, we agree with the district court that false arrest and imprisonment involves a direct physical restraint on the person, and thus survives under Illinois law as an action "to recover damages for an injury to the person." Ill. Rev. Stat. Ch. 3, § 339. See *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977).

On that date, Walker was accompanied by a team of police officers to a Chicago criminal court, where he testified against Green. Immediately thereafter, Walker informed the officers that he had been threatened by Lewis in the courtroom. Specifically, Walker charged that Lewis had grabbed him by the arm and warned, "Well, that's it for you." Although the alleged threat was not witnessed by any of the policemen, Commander McDonald ordered the arrests of Lewis and the six Goldblatt employees. The seven men were then detained for periods ranging from three to fifteen hours, only to be released when McDonald determined that the evidence was insufficient to charge them.

In the subsequent action for damages brought by Lewis and the six employees, the plaintiffs' amended complaint asserted two grounds for recovery: (1) a claim under 42 U.S.C. § 1983 for the allegedly unconstitutional arrests (Count I); and (2) a claim under Illinois common law for false arrest and imprisonment (Count III). As to the six employees, the trial judge directed a verdict against police officers McDonald and Juriss on both counts, while the jury returned a verdict against Goldblatt's on the state law claim alone. In addition, the trial judge granted Butler and Jenkins judgment notwithstanding the verdict on both counts against Officers Krause and Kowalski. As to the plaintiff Lewis, the jury returned a verdict against Goldblatt's on the § 1983 claim, but found no liability on the part of the policemen under either count.

To resolve the issues presented on appeal, we must examine the various findings of liability against the defendant-appellants. To this end, we may begin with the state and federal claims against the police appellants arising from the arrests of the six Goldblatt employees. Since the arrests were made without warrants, their

validity under both Illinois common law² and the United States Constitution depends on whether, at the moment they were made,

“the officers had probable cause to make [them]—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Goldblatt employees] had committed or [were] committing an offense.”

Beck v. Ohio, 379 U.S. 89, 91 (1964). On the facts of this case, such a determination of probable cause must hinge on the weight to be given the information that was supplied by the informant Young. Accordingly, we must examine the “underlying circumstances from which the officers concluded that *the informant was credible or his information reliable.*” *McCray v. Illinois*, 386 U.S. 300, 304 (1967) (emphasis supplied); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

As to the credibility of the informant, it is quite apparent that the police officers had no reasonable basis for believing Young to be a reliable informant. The record discloses that the police appellants did not have any

² It seems clear that under Illinois common law an action for false arrest and imprisonment will lie if the arrest is made without probable cause. See *Middleton v. The Kroger Co.*, 30 Ill. App. 3d 295 (1976); *Odorizzi v. A.O. Smith Corporation*, 452 F.2d 229, 231 (7th Cir. 1971). The Illinois courts have held that probable cause exists when

“the facts and circumstances within the arresting officer’s knowledge and of which he had reasonable and trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in believing that an offense had been committed, and that the person arrested is guilty.” *People v. Peak*, 29 Ill.2d 343, 348; *People v. Mills*, 98 Ill. App.2d 248, 254 (1968).

prior experience with Young, and indeed did not even know that he was the individual who was supplying the information.

By the same token, it is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations. See *Spinelli v. United States*, 393 U.S. 410, 413, 417 (1969); *Draper v. United States*, 358 U.S. 307 (1959). On this point, the police appellants argue that the substance of the allegations was corroborated by the threatening remarks that Lewis allegedly made to Walker in the courtroom. But this argument ignores a crucial point, namely, that the alleged confrontation between Lewis and Walker was not witnessed by any of the law enforcement officers. Indeed, the police appellants had *no first hand knowledge of any facts* to support a belief that the six Goldblatt employees were engaged in criminal activity at the time they arrested them. Accordingly, we have no difficulty in concluding that a reasonable man could not find that the arrests were based on probable cause.

By the same reasoning, we must also conclude that the so-called “good faith” defense under 42 U.S.C. § 1983 is not available to the police officers in this case. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that if police officers “reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.” *Id.* at 557. Thus, the crucial question is whether the law enforcement officers “acted in good faith with a reasonable belief in the constitutionality of their conduct.” *Brubaker v. King*, 505 F.2d 534, 537 (7th Cir. 1974); and, as noted above, we find no basis for a “reasonable belief” that the warrantless arrests of the six employees were based on probable cause and hence constitutional. It is our conclusion, therefore, that the directed verdict against Commander McDonald and Ser-

geant Juriss, and the judgment notwithstanding the verdict against Officers Krause and Kowalski must be affirmed.

We turn now to the question of Goldblatt's liability to the six employees under the state law claim of false arrest and imprisonment. It is well settled in Illinois that "giving information to police in itself is insufficient to constitute participation in an arrest." *Odorizzi v. A.O. Smith Corporation*, 452 F.2d 229 (1971). Thus, in *Morris v. Faulkner*, 46 Ill. App. 3d 625 (1977), the court declared that a private party who furnishes inaccurate information to law enforcement officers could not be held liable for false arrest on that ground alone:

"The complaint merely alleges that [the defendants] called Sheriff Faulkner and made 'false accusations that plaintiffs would cause trouble. Thus, at most, liability of [the defendants] could only be based upon having conveyed information of an erroneous opinion to the proper authority. With this information, Faulkner was free to take whatever action, if any, he chose. Therefore his acts, whether lawful or unlawful, could not give rise to liability for [the defendants] since they had not directed or procured those acts.'"

Id. at 620 (emphasis supplied). Similarly, in *Middleton v. The Kroger Co.*, 30 Ill. App. 3d 295 (1976), the court found no liability for false arrest and imprisonment where the defendants "did not at any time sign a complaint against the plaintiff, did not request the police officer to arrest the plaintiff and did not detain the plaintiff." *Id.* at 298.

In the case at hand, the jury returned a verdict against Goldblatt's on the six employees' state law claim of false arrest. The record discloses, however, that Goldblatt's did not in any way detain the employees, nor did it sign a complaint against them or direct the officers to arrest them. Rather, the evidence suggests that Goldblatt's did

nothing more than give information to the police, who were then free to decide for themselves whether or not the employees should be arrested. It is our view that this evidence is not sufficient under Illinois law to support a verdict of liability against Goldblatt's, and, for this reason, we must set aside the judgment of the jury on the state law claim of false arrest and imprisonment.

These same considerations also compel the conclusion that Goldblatt's "participation" in the arrest of Lewis is not actionable under 42 U.S.C. § 1983. The Supreme Court has made it clear that two elements are necessary for recovery of damages under § 1983:

"First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, The plaintiff must show that the defendant deprived him of this Constitutional right 'under color of any statute, ordinance, regulation, custom or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'"

Adickes v. Kress & Co., 398 U.S. 144, 150, (1970). Furthermore, in construing the "under color of law" requirement, the Court has held that

"[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state or its agents."

United States v. Price, 383 U.S. 787, 794 (1966).

In applying these principles to the instant case, we are again unable to find in the record any significant evidence to suggest that Goldblatt's did anything more than supply information to police officers who then acted on

their own initiative in arresting Lewis; and we decline to hold that the mere act of furnishing information to law enforcement officers constitutes "joint activity with state officials in the *prohibited action*" (that is, the allegedly unconstitutional arrest of Lewis). Accordingly, we must also set aside the jury's verdict against Goldblatt's on Lewis' claim for relief under §1983.

We note, finally, that the district court considered the nature of the verdicts in determining the award of attorneys' fees under 42 U.S.C. §1988, and it specified that \$15,000 of the \$25,000 award was to be paid by Goldblatt's. We must therefore remand the case for a redetermination of attorneys' fees consistent with the views expressed in this opinion.

We have examined the appellants' other arguments and find them to be without merit. Accordingly, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

Memorandum Opinion of the United States Court of Appeals for the Seventh Circuit, entered March 26, 1979, and corrected April 19, 1979, denying petitioners' petition for rehearing *en banc*.

CORRECTED on April 19, 1979

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 26, 1979

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ROY W. HARPER, *Senior District Judge**

Nos. 77-2043, 77-2044, 77-2074 and 77-2149

LAWRENCE BUTLER, CECIL DAVIS, RON JACKSON, CHARLES JAMES, MONROE JENKINS, ERNEST LEWIS, JAMES NASH, and ESTATE OF NATHAN NASH, Deceased,

Plaintiffs-Appellees,

v.

GOLDBLATT BROS., INC., THOMAS MARSH, DENNIS McFARLAND, ANDRE WALKER, WAYNE YOUNG, and ELMER GERL, JOHN KOWALSKI, JOHN JURISS, FRANK KRAUSE, and JOHN McDONALD,

Defendants-Appellants.

On Petition for Rehearing and Suggestion for Rehearing
In Banc

* The Hon. Roy W. Harper, Senior District Judge of the United States District Court for Eastern and Western Districts of Missouri, is sitting by designation.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled cause by the plaintiffs-appellees and the police defendants-appellants, a vote of the active members of the Court was requested and a majority of the active members of the Court have voted to deny a rehearing *in banc*.** All of the judges on the original panel have voted to deny the petition for rehearing.

The plaintiffs-appellees' petition for rehearing notes that the panel's opinion appears to ignore the fact that Walker (a Goldblatt's employee) signed a complaint against Lewis after allegedly receiving a threat from him. In our view, however, this fact is not enough to establish that Goldblatt's acted in concert with state officials and is therefore liable under § 1983. Moreover, we are not persuaded that the arrest of Lewis was made without probable cause.

Accordingly, IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

** Chief Judge Fairchild and Judge Swygert voted to grant rehearing *in banc* regarding plaintiffs-appellees' petition.

APPENDIX C

Memorandum Opinion of District Judge Bernard M. Decker entered September 1, 1977, denying respondents' motion for a new trial.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

LAWRENCE BUTLER, et al.,

Plaintiffs,

v.

GOLDBLATT BROTHERS, INC., et al.,

Defendants.

No. 74 C 3000

MEMORANDUM OPINION AND ORDER

The Goldblatt defendants (Goldblatt Bros., Inc., Thomas Marsh, Andre Walker, Dennis McFarland and Wayne Young) have moved for a judgment notwithstanding the verdict or for a new trial. The jury instructions in this case accorded with the law governing the case. The verdict reached by the jury was amply justified by the evidence and the damages assessed cannot be considered excessive. This motion is hereby ordered denied.

The Goldblatt defendants have also moved for an award of \$50,000 as reasonable attorney's fees for their defense of the instant case, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. The court fails to perceive how these defendants can in any way be viewed as the prevailing party in this action. Although only one of the eight plaintiffs prevailed on the civil rights count against these defendants, a substantial judgment was awarded to

seven of the plaintiffs against these defendants on the pendent state law count. The pendent count is based on the identical conduct upon which the civil rights claim was founded. These defendants were found to have violated the rights of the seven plaintiffs, and were not the prevailing party. Since they are not entitled to any award of costs, the instant motion is hereby ordered denied.

The police defendants (John MacDonald, John Juriss, Elmer Gerl, John Kowalski and Frank Krause) have moved for a judgment notwithstanding the verdict and for costs and attorney's fees. This court has directed a verdict in favor of six of the plaintiffs against MacDonald and Juriss on both the civil rights and pendent state counts for the reasons articulated in great detail in its previous memorandum opinion.

After hearing the evidence, the court remains convinced that a reasonable man could not believe that there was probable cause to arrest these six plaintiffs. The fact that the jury was apparently convinced that the Goldblatt's defendants were even more culpable than the police does not alter this determination. Furthermore, since six of the plaintiffs prevailed on both counts against MacDonald and Juriss, these defendants cannot be viewed as the prevailing party entitled to an award of attorney's fees. In addition, defendants Kowalski and Krause admitted that they participated in an arrest which the court has held could not have been made with a reasonable belief of probable cause. While no judgment has been obtained against defendant Gerl, his defense was so intimately related to that of the other police defendants as to justify the denial of any award of attorney's fees. Accordingly, the police defendants' motion for judgment notwithstanding the verdict and for costs and attorney's fees is hereby ordered denied.

The plaintiffs have also moved for a judgment notwithstanding the verdict in favor of (1) Lawrence Butler against defendant Kowalski; (2) Monroe Jenkins against

defendant Krause; (3) Cecil Davis against defendant Juriss on Counts I and II, and against Goldblatt Bros., Inc. on Count III; and (4) in favor of plaintiffs Butler, Jackson, James, Jenkins, James Nash and the estate of Nathan Nash against defendants Krause, Gerl and Kowalski. As indicated the court is in substantial agreement with the verdict reached by the jury in this case. However, officers Kowalski and Krause did admit at trial to having effected the arrests of Butler and Jenkins, respectively. Accordingly, judgment shall be entered in favor of Lawrence Butler against defendant Kowalski, and in favor of Monroe Jenkins against defendant Krause. This in no manner requires any modification of the damage award found appropriate by the jury for the injuries suffered by these two plaintiffs. The remainder of the plaintiffs' motion for judgment notwithstanding the verdict is hereby ordered denied.

The plaintiffs' motion for an award of attorney's fees and costs remains under advisement.

ENTER:

Bernard M. Decker

United States District Judge

DATED: September 1, 1977.

APPENDIX D

Statutory Provision Involved

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX E

Petitioners' Petition for Rehearing *En Banc* filed with United States Court of Appeals for the Seventh Circuit January 13, 1979.

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

U.S.C.A. Nos. 77-2043, 77-2044, 77-2074, 77-2149

LAWRENCE BUTLER, ET AL,

Plaintiffs-Appellees,

v.

GOLDBLATT BROS., INC., ET AL
and JOHN McDONALD, ET AL,

Defendants-Appellants.

CONSOLIDATED

Appeal from the U. S. District Court for the Northern
District of Illinois, Eastern Division, No. 74 C 3000,
Judge Bernard M. Decker, Presiding.

PLAINTIFFS-APPELLEES' PETITION FOR
REHEARING OR REHEARING EN BANC

Plaintiffs-Appellees LAWRENCE BUTLER, ET AL ("Petitioners") by their attorneys, JOHN C. HENDRICKSON and H. AYRES MOORE, petition this Court for rehearing or rehearing *en banc* in this cause.

This cause came before this Court on appeal from the Northern District of Illinois, Eastern Division, Judge BERNARD M. DECKER, presiding. Judge Decker entered directed verdicts and judgments *n.o.v.* against the police officer defendants under 42 U.S.C. §1983 and under the law of Illinois for false arrest and imprisonment. The jury held defendant GOLDBLATT BROS., INC., and

its security agents, defendants THOMAS MARSH, ANDRE WALKER, and DENNIS McFARLAND (collectively, "Goldblatts") liable to all Petitioners, except Ernest Lewis, under Illinois law; the jury returned a verdict in favor of Lewis and against GOLDBLATT BROS., INC. and WALKER under 42 U.S.C. §1983. All defendants appealed.

This Court, per Circuit Judge Bauer, held that the arrests of all Petitioners, except Lewis, violated their civil rights and constituted false arrest and imprisonment under Illinois law. It affirmed Judge Decker's entry of directed verdicts and judgments *n.o.v.* against the police officers. This Petition is *not* directed to that portion of the Court's decision. It is directed only to the reversal of the jury verdicts against Goldblatts.

Judge Decker held by written opinion that "[t]he verdict reached by the jury was amply justified by the evidence," and he stated "the court is in substantial agreement with the verdict reached by the jury in this case." (R. 131, at 1 and 3) Despite Judge Decker's intimate knowledge of the case and his unqualified finding as to the ample evidence supporting the jury's verdicts, this Court reversed *all* of the verdicts rendered by the jury on the sole ground that the evidence was not sufficient to support a finding that Goldblatts did anything more than merely provide information to the police. The Court agreed that the "information" supposedly supplied was not credible.

In reversing, this Court adopted the version of the facts urged by Goldblatts, the losing party and ignored vital facts uncontestedly of record. For example, the Court states that Goldblatts did *not* sign a complaint against any of the Petitioners employed by Goldblatts; it further states that "[t]hese same considerations also compel the conclusion that Goldblatts' 'participation' in the arrest of Lewis is not actionable under 42 U.S.C. §1983," and "we are again unable to find in the record any significant evidence that Goldblatts did anything more

than supply information to police officers." (Bauer Opinion, 12/29/78, at 6-7) To the contrary, the records shows that, prior to the arrest of Lewis and any of the other Petitioners, Walker was asked "if he would sign a complaint and he indicated that he would" (Juriss, Tr. 402) and that Walker did indeed sign a formal criminal complaint against Lewis. (Stipulated Facts, ¶I-16; R.88)

This Court's reversal of the jury's verdicts, and the necessarily implicit finding that Judge Decker abused his discretion in refusing to set them aside, constitute an unwarranted intrusion upon the sanctity of the jury and the discretion of the trial judge, is contrary to law, and require that this cause be reheard by Judges Bauer, Pell, and Harper, and, in the event they decline to do so, then by this Court *en banc*.

I

As indicated, the Court's reversal appears to have been predicated upon Goldblatts' version of the facts which was hotly contested below and upon a few Illinois decisions wholly distinguishable from the instant case. The Court states, for example, that the events at issue "began" with Wayne Young's report of a bogus plot to murder Andre Walker. However, there was ample testimony from which the jury was entitled to infer that Young's "report" was dreamed up after the fact, that the arrests really sprang from the prior hostility of Goldblatt's warehouse security agents toward Jenkins and the other Petitioners (e.g., Walker had previously had Jenkins arrested for "verbal assault" and had attempted to have him fired), that Young did not tie the alleged plot to Walker's anticipated testimony in criminal court on September 25, that Young was used by Walker in exchange for Walker's not testifying against Young in criminal proceedings then pending against him, that Walker and Young's testimony concerning the plot and Goldblatts' "innocent" utilization of the police was unbelievable, and that Goldblatts induced and participated in the arrests.

Morris v. Faulkner, 46 Ill. App. 3d 625 (1977) and *Middleton v. Kroger*, 38 Ill. App. 3d 295 (1976), cited by Goldblatts and relied upon by the Court are totally inapposite. In *Morris*, there was not even an arrest, much less an unconstitutional arrest; the only prior contacts with the police were two telephone calls made by a barmaid; and, the only police action was a request that plaintiffs leave the bar. In *Middleton*, the only pre-arrest contact with the police was one telephone call, the private party was not at the scene of and did not play any role whatever in the arrest, the arresting police officer personally observed tangible evidence of the crime prior to the arrest, and the plaintiff was not "jailed or incarcerated at any time in connection with this episode." *Middleton v. Kroger*, *supra*, at 38 Ill. App. 3d 297. This Court's reliance upon facts argued by the losing party and upon inapplicable cases is truly exceptional and requires reconsideration.

II

There should be no dispute as to this Court's very restricted role in reviewing evidence considered by a jury in reaching its verdict, especially when the trial judge most familiar with the case finds it "ample" and specifically indicates his own concurrence in the jury's verdict. Nor should there be any dispute as to Illinois and Federal law applicable to this case.

Disputed issues of fact are to be resolved by the jury; a jury's verdict cannot be set aside unless there is simply no credible evidence from which the jury's conclusion may be inferred. An appellate court is not justified in rejecting the jury's verdict because it might have reached a different conclusion; it must accept as true that version of the testimony which the jury might have adopted in reaching its verdict, and it must indulge every reasonable intendment in favor of the verdict. *Continental Airlines v. Wagner-Morehouse, Inc.*, 401 F. 2d 223 (7th Cir. 1968); *Galard v. Johnson*, 504 F. 2d 1198 (7th Cir. 1974); *Bucher v. Krause*, 200 F. 2d 576 (7th Cir. 1952); *Gebhardt*

v. Wilson, 348 F. 2d 129 (3rd Cir. 1965); *Cyclopedia of Federal Procedure* 3d, §67.31. In sum, the law requires that a full measure of respect be accorded the jury's verdict and that the sanctity thereof be violated only in the most exceptional and compelling circumstances. No such circumstances are present in the instant case.

Petitioners agree that "merely providing information justifying an arrest to the police" does not give rise to liability for false arrest under Illinois law. It is certain, however, that actions of private parties which "induce," "instigate," "procure," "prompt," or otherwise "cause" an unconstitutional arrest do give rise to such liability. *Dodds v. Board*, 43 Ill. 95 (1867); *Reno v. Wilson*, 49 Ill. 95 (1868); *Zimbron v. 1400 Lake Shore*, 8 Ill. App. 2d 542 (1956); *Odorizzi v. Smith*, 452 F. 2d 231 (1971). It is equally certain that a private party who "participates" in an unlawful arrest, either directly or indirectly, is liable therefore, and that "what constitutes participation depends on the facts and circumstances of each case." *Luker v. Nelson*, 341 F. Supp. Ill. (N.D. Ill. 1971); 35 C.J.S. False Imprisonment §28 (emphasis added). The requirements of 42 U.S.C. §1983 are quite similar: "It is enough that [the private party] is a willful participant in joint activity with [the police]" giving rise to the unconstitutional arrest. *U.S. v. Price*, 383 U.S. 787 at 794 (emphasis added).

There is no dispute that Judge Decker's instructions to the jury followed the law and that he placed the critical issue of fact (whether Goldblatts induced and participated in the illegal arrests or, instead, merely provided information to the police) squarely before it. He had observed, "there exists a question of fact regarding the exact connection between the conduct of the police and the activities of [Goldblatts]." (R. 102, at 15) The jury clearly determined that Goldblatts' instigation of and deep involvement and intervention in all of the police activities—from start to finish—met the required standard. This Court's rejection of the jury's view of the evi-

dence and its substitution of its own contrary interpretation thereof must be reexamined.

III

It is impossible to set forth in this brief Petition all of the testimony heard by the jury. It is equally impossible to reduce to print the attitude of arrogance and indifference to the truth displayed by Andre Walker on the witness stand, the desperate attempts of Wayne Young to reconcile the glaring contradictions between his own pre-trial sworn statements and his direct testimony, and, in contrast, the sober and credible demeanor of each of the Petitioners as they testified and submitted themselves to cross-examination. Petitioners do, however, direct the Court's attention to the following matters of fact and submit that they provided a more than sufficient basis for the jury's conclusion that Goldblatts *in this particular case* induced, instigated, procured, and caused the unconstitutional arrests of Petitioners and actively participated therein:

1. On September 19, 1974, Marsh contacted the police and falsely told them that Goldblatts had received an anonymous telephone tip of a plot to murder Walker. (Krause, Tr. 745-746) When the police refused to act, he went back with a new story, claiming that the "information" had originated with an unnamed informer employed by Goldblatts. (Krause, Tr. 744-746) The jury was entitled to infer from this and the surrounding circumstances (see, e.g. ¶¶8-9, *infra*) that Goldblatts invented the "informer" story to induce police action.

2. Marsh and Walker met with the police at Area 3 on September 19, a week before the arrests (Marsh, Tr. 532, McDonald, Tr. 313). Marsh allegedly told the police that money had been collected for the plot and that Petitioner Lewis was to be the "trigger man." (Marsh, Tr. 534) Goldblatts made a "request for support" from the police (McDonald, Tr. 316) and began "participat[ion] in the development of plans" for September 25. (Juriss,

Tr. 373) The jury was entitled to infer that Goldblatts' effort to induce police action and its participation in joint activities with the police began at this time.

3. Marsh and Walker told the police that they would not comply with the police request for the identity of the "informer" because of concern for his safety. (McDonald, Tr. 315; Krause, Tr. 728) Marsh later admitted that he had utterly no objective basis to believe the informer would be endangered by disclosure to the police. (Marsh, Tr. 510) Walker later admitted that the identity of the informer was concealed from the police so as not to "blow his cover," and because "it would make him ineffective as an undercover investigator for Goldblatts." (Walker, Tr. 788, 824) The jury was entitled to infer from Goldblatts' transparent excuse for refusing to disclose the informer that they were deceiving, rather than providing information to the police.

4. The police testified that they had an *obligation to investigate* the accusations when made on September 19 (Juriss, Tr. 414-415), but that it was "impossible" to investigate without the information withheld by Goldblatts. (Juriss, Tr. 429). On the same subject, Walker testified as follows:

Q: So, in effect, Andre Walker and Thomas Marsh were making decisions about what way it was to be done, is that correct?

A: In which way? The way the investigation was being handled, do you mean?

Q: That is right.

A: At the time, yes, because we were the only ones who could investigate it. (Walker, Tr. 825-826)

The jury was entitled to infer that Goldblatts, far from acceding to police requests for cooperation, acted to block a legitimate police investigation which would have exposed the false nature of the accusations and precluded the subsequent arrests. This inference is buttressed by Walker and Marsh's later admission that they made no investigation. (Marsh, Tr. 539-540; Walker, Tr. 837)

5. Marsh and Walker went to Area 3 and met again with the police on September 24. They "discussed the thing about them [Petitioners] forcing Walker off the curb and attempting to shoot him as they forced him off the road. (Marsh, Tr. 545) They discussed "[h]ow we were going to do it, whether we were going to be in plain-clothes, and what kind of car and Walkie-Talkie, and things like that." (Marsh, Tr. 545) Walker did obtain a walkie-talkie from the police for his use the following day. (Juriss, Tr. 386, Walker, Tr. 792) At the same meeting, the police requested that the informer be made available to the State's Attorney's office and Goldblatts rejected that request. (Marsh, Tr. 546) The jury was entitled to infer that Walker and Marsh were attempting to create an aura of criminality around the Petitioners, that they were manifestly *not* interested in cooperating with the police but only in using them, and that Marsh and Walker were heavily engaged in joint activities with the police.

6. During this period Marsh and Walker devised a scenario for the events of September 25. Marsh described it in some detail:

A: . . . *We hoped that this action that would happen the following day would stop a further attempt.*

Q: How serious did you take that plot to be?

A: We took it very seriously. *We had to see what would happen after that day [September 24]. We were very convinced that some type of action would have happened that day.*

. . .

Then, and possibly through the person that would make the attempt, an arrest would be made, and, through him, the other individuals would be found out.

Q: And then, supposedly would be prosecuted for attempted murder, is that the idea?

A: Right. Right.

Q: So, the *decision was made*, I take it *by you*, that

A: *Walker and myself.*

Q: *By you and Walker* that if, in fact, there was a murder plot, in a sense, just be aware of the plot and be ready to catch the perpetrators as they tried to murder him?

A: Right, and in essence, I think that Walker was using himself as bait. (Marsh, Tr. 547-548 [emphasis added])

The jury was entitled to infer Goldblatts intended to induce arrests, that Walker and Marsh devised the way in which the arrests would take place, and that Marsh and Walker were effectively directing the actions of the police. The jury was also entitled to infer that Walker's accusation of Lewis on September 25 was made for the sole purpose of carrying out the Goldblatts scenario and inducing police action against Petitioners. (see, e.g., ¶¶10-12)

7. That this scenario was directed against Jenkins and the other Petitioners came as no surprise to the jury:

Q: Isn't it a fact, Mr. Walker, that you blame Monroe Jenkins for the hostility existing between the Goldblatt's Security department and the Goldblatt's truck drivers.

A: I don't put all the blame on him but he had had a lot to do with it, yes.

. . .

Well, he creates a problem all the time. Whenever we attempt to unload somebody's truck he seems to think that he is the dock lawyer, or something. That's what the guys call him. And he is always in the middle of it, you know; "You don't have to do this because Security tells you to," and "You don't have to do that. You don't have to handle your papers. You don't have to do everything that Security tells you to."

. . .

Q: Isn't he known as one, I mean, as a person who stands up for his rights, for the rights of himself and his friends?

A: No, he is known for making trouble any time he gets the chance. He likes to create chaos. (Walker, Tr. 843)

The hostility between Goldblatts' security personnel and Petitioners was further illustrated by Walker's testimony as to "having words" with some of them and writing them up for eating ice cream cones "on company time." (see, e.g., Walker, Tr. 805, 806) Petitioner Jenkins, who was originally hired by Walker as a security agent, testified to a series of run-ins with security beginning when he resigned from security and joined the union (Jenkins, Tr. 211-213), extending through the security department's having him fired twice (Jenkins, Tr. 213) and then Walker's having him arrested by the police for "verbal assault." (Jenkins, Tr. 217-218) The jury was entitled to infer, then, that Goldblatts' security personnel devised the story of the murder plot and the arrest scenario in order to induce the police to "crack down" on Petitioners. This inference was further supported by a remark which Walker admitted making to Marsh after the arrests were made: "I hope they are scared off now." (Walker, Tr. 843)

8. Goldblatts intentionally deceived the police as to the supposed "motive" behind the "conspiracy" to murder Walker. The police clearly understood that the murder was to be "in retaliation" for Walker's testimony in the Young-Green case on September 25. This, according to Marsh and Walker, was what their "informant" told them. Yet, on the cross-examination of Wayne Young, the informer, it was brought out that he had previously testified under oath that he never knew any reason why Walker was to be killed: "*I don't know what it was. It could have possibly been for anything.*" (Young, Tr. 889) It was further brought out that Young himself was a *defendant* in the very case in which Walker was to testify at 26th

and California on September 25, and that the charges against him were dropped as a result of Walker's testimony. (Juriss, Tr. 384-385) The jury was entitled to infer that the "motive" behind the conspiracy, as related to the police by Goldblatts, was a ploy designed to induce police action against Petitioners. Note that Young's identity was *not* disclosed to the police at 26th and California (the perfect time to do so) and that the police did not know Young was the informer until *after* Lewis was arrested, and the jury's inference becomes clear: Young agreed to "become the informer" *after* Walker's testimony saved him from being bound over to the grand jury for indictment. This inference is supported by Young's subsequent pre-trial admission that "he didn't want to be the informant in this case but he was doing Andre Walker a favor." (Jackson, Tr. 696)

9. Young's sorry performance as an "informer" was exposed upon cross-examination. Virtually every statement he made as to *when* he supposedly learned of the alleged plot was impeached by *his own prior testimony under oath*. (Young, Tr. 870-908) Further, there was independent documentary evidence (Aetna Bearing Company time clock cards) and Petitioner Lewis' testimony which established that Lewis could not have been on the South Side hatching a murder plot when Young said that he was. (Lewis, 933-940) Finally, each of the Petitioners denied that they had *ever* discussed *any* plans to kill, injure, or otherwise harm Walker. The jury was entitled to infer that Young played no role in causing the unlawful arrests and was only used after the fact to "back-up" Goldblatts' story.

10. Following his testimony in the Young-Green case, Walker met with Officer Juriss in a corridor at 26th and California. (Walker, Tr. 798; Juriss, Tr. 390) At this meeting Walker accused Lewis of assaulting him in the courtroom. This was a total fabrication. Juriss had been "concentrating" on Walker and did not see any incident of any kind involving Lewis and Walker. (Juriss, Tr. 389-390). Wayne Young, Walker's own informer, was on

the scene "a few paces behind" Walker (Walker, Tr. 834), and he denied seeing any such incident. Finally, Lewis testified that he did not touch or say anything to Walker. (Lewis, Tr. 74) The jury was entitled to conclude that Walker's accusation of Lewis was a lie, made for the sole purpose of activating the scenario devised by Marsh and Walker (see, ¶6, *supra*), causing Lewis's arrest, and inducing the police to arrest the other Petitioners without interviewing the alleged informer.

11. While still at 26th and California and *before the arrest of Lewis* or any of the other Petitioners, *the police asked Walker "if he would sign a complaint and he indicated that he would."* (Juriss, Tr. 402 [emphasis added]). Walker then pointed out Lewis from among "a lot of people waiting at the elevator bank." (Juriss, Tr. 391) Lewis was subsequently arrested, and *Walker went to Area 3 and signed a formal, criminal complaint against him.* (Juriss, Tr. 403; Walker, Tr. 800; Stipulated Facts, ¶I-16) The jury was entitled to conclude that Goldblatts had acted under color of law and caused Lewis' arrest.

12. Marsh and McFarland then, on their own accord, went to Area 3. McDonald testified that he saw Marsh and Walker "a number of times as I circulated through the station" (McDonald, Tr. 322) The decision was then made to proceed with the arrest of the other Petitioners to be identified by Goldblatts. (McDonald, Tr. 332) Walker's accusation of Lewis and his charging him criminally was the major factor which induced the police to proceed with the arrests. (McDonald, Tr. 330, 769)

13. The accusations made by Goldblatts were the sole basis for the arrests of Petitioners. (McDonald, Tr. 329; Juriss, Tr. 402-403; Stipulated Facts, ¶II-19) The jury was entitled to conclude that Goldblatts instigated and induced the arrests of Petitioners.

14. The police had neither probable cause nor warrants authorizing them to arrest Petitioners on the Goldblatts warehouse premises, yet Goldblatts permitted the police to enter and remain on the premises for over five

hours arresting Petitioners. (Stipulated Facts, ¶I-6) The jury was entitled to infer that Goldblatts made its facilities available to the police to conduct the illegal arrests induced by Marsh and Walker.

15. When Petitioner Butler pulled his truck into the warehouse, "Dennis McFarland pointed me out, he said, 'That's one of them. That's Larry Butler,'" and the police arrested him. (Butler, Tr. 275) and Walker were also present when Butler was arrested. (Butler, Tr. 275-276)

16. When Petitioner Jenkins pulled in, McFarland came up to him with a police officer and said, "That's one of them," and the police arrested him. McFarland, Walker, and the police engaged in conversation "right beside my [Jenkins'] truck." (Jenkins, Tr. 201) After Jenkins was arrested, he refused to turn over his keys, and Goldblatts personnel then intervened in the arrest process. Jenkins' boss, the dispatcher, "told me, he said, 'Jenkins, there isn't anything that I can say but I got a call from downtown to keep hands off this,' and he said, 'Give me the keys and go on with him [the police].'" (Jenkins, Tr. 207 [emphasis added]) The jury was entitled to conclude that Goldblatts was participating in the arrests, that Goldblatts had been anticipating the arrests, and Goldblatts personnel had been instructed to make certain the arrest process went smoothly, even to the extent of intervening in the arrest process itself.

17. When Petitioner James entered the warehouse he was identified by Walker. Walker and Marsh were standing around with the police: Walker "was standing there with both hands in his pockets, and he said, 'That's one of them,' with a big smile on his face." (James, Tr. 590)

18. "Pursuant to instructions from . . . Marsh, . . . McFarland left the Goldblatts warehouse with police officers and in a police car . . . to search for [Petitioner] James Nash." McFarland spotted Nash and the police stopped and arrested him. (Stipulated Facts, ¶I-8) Another truck driver was with McFarland and the police; he jumped into Nash's truck and drove it off. (J. Nash,

Tr. 624) Juriss had not know McFarland and the extra driver went on this expedition. (Juriss, Tr. 412-413) After Nash was arrested and in custody in the police cruiser, McFarland attempted to interrogate him in the presence of the police: "And that's when the security guy asked me, he said, 'What do you know about the Jesse Green case?'" (J. Nash, Tr. 623) The jury was entitled to infer that Goldblatts security personnel were actively participating and unlawfully intervening in the arrests.

19. Marsh and McFarland were present for Jackson's arrest (Jackson, Tr. 684), as was Walker: "And Andre Walker pointed his finger out and say, 'Yeh, that's one of them,' and he was standing over there laughing." (Jackson, Tr. 683) After Jackson had been transported to Area 3, Marsh came into the room in the police station where he was being held and began to berate and interrogate him:

Well, I sat there for a while and then Tommie Marsh and McFarland came in and Tom Marsh said, "Ron, why did you do it? I don't believe that you could do something like this." So, I told him, "I haven't did anything. I didn't even know what it was all about." And he said, "I wouldn't believe that you would do something like this." I told him I didn't do anything, you know. (Jackson, Tr. 687-688)

The jury was entitled to conclude from Goldblatts' participation in all phases of the arrests, including custodial interrogation, that Goldblatts was liable.

20. Lewis had also been subjected to similar actions by Goldblatts *after* his arrest and *while in custody at Area 3*. Marsh, who had no authority to subject any prisoner to a "line-up" told McFarland, while at Area 3, "to take a look at Lewis and see if you can identify him," and McFarland did so. (Marsh, Tr. 553). In addition:

Q: . . . Was there anyone else besides Andre Walker that day that you saw [at Area 3] who works for Goldblatts . . .

A: Well, Tom Marsh and Dennis McFarland, or whatever his name was, *I thought that they were police officers.*

. . .

Q: And what did you see Tom Marsh do?

A: Well, he came into the room after the other officer left out of there and he told me—First I said, "I'm no criminal," and, well, he said, "If anything happens to Andre Walker"—that something bad is going to happen to me. So I kept saying, "I am no criminal. I don't even know this man."

Q: And what did he say?

A: He just—he just told me that if anything bad happened to him something bad was going to happen to me. (Lewis, Tr. 89-91)

The cumulative effect of all of the foregoing supports the jury's conclusion that Goldblatts "participated in joint activity" with the police in causing Lewis' unconstitutional arrest and imprisonment.

WHEREFORE, Petitioners, LAWRENCE BUTLER, ET AL, respectfully pray that this Court grant their Petition for Rehearing or Rehearing *En Banc*.

Respectfully submitted,

LAWRENCE BUTLER, ET AL,
Petitioners, by their attorneys.

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